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414385—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 498

GEORGE POLAKOFF AND WILLIAM ALBERT,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 175–180) is reported in 121 F. (2d) 333.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 14, 1941 (R. 180). The petition for a writ of certiorari was filed August 9, 1941. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

The petitioners conspired to influence an Assistant United States Attorney to recommend a lenient sentence in a federal criminal proceeding; the influence was exerted through concealment and misrepresentation but no attempt was made to bribe or otherwise to corrupt him. The question is whether the petitioners conspired, under Section 135 of the Criminal Code, corruptly to endeavor to influence the discharge of the official duties of the Assistant United States Attorney or corruptly to endeavor to influence the due administration of justice.

STATUTES INVOLVED

The pertinent portion of Section 135 of the Criminal Code (18 U. S. C., sec. 241) reads:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, * * * or impede any * * * officer in or of any court of the United States, * * * in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due ad-

> ministration of justice therein, shall be fined not more than $1,000, or imprisoned not more than one year, or both.

Section 37 of the Criminal Code (18 U. S. C., sec. 88) reads:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

Petitioners were convicted upon an indictment in one count (R. 9–12, 147–148) charging a conspiracy "corruptly to endeavor to influence, obstruct, and impede and corruptly to influence, obstruct, and impede the due administration of justice in the United States District Court for the Southern District of New York, and corruptly to endeavor to influence and impede officers in and of the United States District Court for the Southern District of New York in the discharge of their official duties" (R. 9). Each was sentenced to two years (R. 13, 15).

The uncontradicted evidence[1] shows that petitioner Albert informed one Kafton, who was under indictment in the United States District Court for

[1] Petitioners introduced no evidence in their behalf.

the Southern District of New York for narcotic violations (R. 24), that for $750 he could arrange through a third party for Kafton to receive a light sentence, i. e., a year and a day (R. 29). Kafton stated that he could get only $500 and petitioner Albert said he would find out whether the third party would accept that amount (R. 33). Petitioner Albert then negotiated an agreement with petitioner Polakoff, the third party to whom Albert had referred (R. 35–44, 75–76, 121–122), under which Polakoff for $500, agreed to get the case placed upon the calendar of a certain district judge (R. 90, 120), whose practice it was to cut approximately in half recommendations for sentences made by prosecutors (R. 41, 42, 119), and to get the United States Attorney to recommend a two-year sentence upon a plea of guilty (R. 42, 44, 122). Petitioner Polakoff next got in touch with the Assistant United States Attorney handling the case (R. 89–95) and, without attempting to bribe or otherwise corrupt him, finally managed to secure his promise to recommend a two-year sentence (R. 95) and to have the case placed on the trial calendar of the desired judge (R. 36, 120). Petitioner Albert then paid petitioner Polakoff $500 (R. 44, 75–76, 122) for "fulfilling his contract" (R. 42, 44, 122) upon the understanding with Kafton that Albert would be reimbursed if sentence were pronounced according to plan (R. 75, 123).

Petitioner Polakoff, a layman, had no legitimate interest as attorney (R. 87, 101), bondsman (R.

100), or otherwise in the Kafton case. At first he stated to the Assistant United States Attorney that he was interested in the case because "he wanted to clean up all the cases where he had written bail for defendants" (R. 89). In later attempts to influence the Assistant United States Attorney he explained that his "real interest" was that he was indebted to a local politician who was in a position to put men to work, and who was interested in Kafton and in his receiving a light sentence (R. 92, 94).

ARGUMENT

Petitioners appear to contend that under the pertinent portion of Section 135 of the Criminal Code (*supra*, p. 2) it is not an offense to endeavor to influence an Assistant United States Attorney in the discharge of his duties, unless there be contemplated the bribery or other corruption of such official.[2] If the wording were in fact as petitioners have tacitly assumed it to be throughout their petition (Pet. 8, 9, 10, 11), i. e., "Whoever * * * shall endeavor *to corruptly influence* * * * any officer * * * of any court," their construction would have rhetorical support. The actual wording, however, does not lend itself to petitioners'

[2] As indicated in the opinion of the Circuit Court of Appeals (R. 175–176), it is doubtful whether this question was raised in the trial court. Indeed, the jury was seemingly instructed, without exception on the part of petitioners, that no bribery or other corruption of the Assistant United States Attorney was required (R. 145–147).

contention. The language is: "Whoever corruptly * * * shall endeavor to influence * * * any officer * * * of any court." The adverb "corruptly" can only modify the verb "shall endeavor" and can only have been employed to characterize the intent necessary to make such an endeavor an offense under the section. Petitioners' construction would virtually narrow the clause to include only bribery cases (Pet. 10), for corruption could not often be accomplished save through some form of persuasion akin to bribery. The section has been held not to be so limited. *Bosselman* v. *United States,* 239 Fed. 82, 86 (C. C. A. 2); *Astwood* v. *United States,* 1 F. (2d) 639, 641 (C. C. A. 8); and cf. *Craig* v. *United States,* 81 F. (2d) 816, 822 (C. C. A. 9), rehearing denied, 83 F. (2d) 450, certiorari denied, 298 U. S. 690.

Petitioner Polakoff was to receive $500 for influencing the Assistant United States Attorney upon a matter resting in his official discretion. Unlike the ordinary situation of an attorney interceding in behalf of his client, Polakoff's interest in the case was not disclosed to the Assistant United States Attorney, and in explaining his interest he falsely informed the Assistant United States Attorney, first, that he was surety for Kafton and, later, that his interest arose out of his indebtedness to a politician who was interested in helping Kafton. In endeavoring to persuade the Assistant United States Attorney in Kafton's be-

half, petitioner Polakoff conveyed the impression that Kafton was to receive a job through this politician's influence. All of these representations were false and plainly of utmost materiality in effecting Polakoff's purpose, i. e., a favorable exercise of official discretion. It is hardly compatible with honesty that an official from whom a discretionary recommendation is sought should be misinformed as to the pertinent facts. Cf. *Marshall* v. *Baltimore and Ohio Railroad Company,* 16 How. 314, 335–336. The statute clearly forbids the influencing of any officer of a United States court by means of threats or force. It is not to be supposed that it was intended to permit the influencing of such an official by misrepresentation or concealment. The word "corruptly" seems plainly to contemplate such methods, as well as actual bribery or like corruption. In *Craig* v. *United States,* 81 F. (2d) 816, 822 (C. C. A. 9), *supra,* the material facts in which are analogous, the court said: "* * * influence may be corruptly exerted upon public officials by means other than political pressure, money, or 'other things of value.' In a government of laws and not of men, motives of personal favoritism, on whatever grounds such motives may be based, are to be deemed corrupt in the administration of public justice."

In addition to the offense of corruptly influencing an official of a United States court, to which petitioners specifically direct their argument, the

statute involved creates the offenses, also charged as objects of the conspiracy in the instant case, of corruptly influencing, obstructing or impeding and endeavoring to influence, obstruct or impede the due administration of justice. Petitioners' contention that the statute only denounces activity akin to bribery finds even less support with respect to offenses of the character specified since it is obvious that in their commission no official corruption need necessarily be involved. Petitioners are in no position to complain if any one of the objects of the conspiracy constitutes an offense. *United States* v. *Smith,* 112 F. (2d) 83, 85–86 (C. C. A. 2); *United States* v. *Koch,* 113 F. (2d) 982, 984 (C. C. A. 2).

The contention that the conspiracy statute has been misused in order to permit the imposition of a heavier sentence (Pet. 13) is unavailing (*United States* v. *Stevenson,* 215 U. S. 200, 203; *Clune* v. *United States,* 159 U. S. 590; *United States* v. *Hutto,* 256 U. S. 524, 529), as is the contention that there can be no prosecution for a conspiracy "to endeavor" to accomplish the various purposes named in the section (Pet. 13–14). *United States* v. *Russell,* 255 U. S. 138, 143.

CONCLUSION

The construction of the statute by the Circuit Court of Appeals is in accord with the undoubted intent of Congress and is in harmony with the

precedents. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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